IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CIVIL APPLICATION NO.1181 OF 2006
IN
APPEAL FROM ORDER NO.354 OF 2001

M/s.Mars Gas Services .. Applicants
versus
Bombay Gas Services .. Respondents

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Mr.Dundana B. Patil for the applicants

CORAM : D.G. KARNIK, J

DATED : 5th April 2007.

P.C.:

1. Heard learned counsel for the applicant.

2. This application is made by the applicant for transfer of the proceedings of Special Civil Suit no.2108 of 1996 from the Court of Civil Judge, Sr. Division, Kalyan to this Court.

3. The applicant had filed a suit bearing Special Civil Suit no. 2108 of 1996 against the respondent for recovery of Rs.2,92,000/-. The respondent contested the suit on merits as well as on the ground that the Court of Civil Judge, Sr.

Division, Kalyan had no jurisdiction to entertain and try the suit. After considering the evidence adduced by the parties, the trial court held that it (Court of Civil Judge, Sr.Division, Kalyan) had no jurisdiction to entertain and try the suit and directed that the plaint be returned to the applicant for presentation to proper court. That order was challenged by the applicant by filing an appeal bearing AO no.354 of 2001. By an order dated 13th October 2006, this Court dismissed the appeal. By this application the applicant prays for an order of transfer of the suit.

4. In my view, the application is totally misconceived. The applicant could have made an application under Order 7 Rule 10-A of the Code of Civil Procedure before the trial court when the trial court ordered return of the plaint. Learned counsel for the applicant however submits that the power can be exercised by this court under Rule 10-B of Order 7 of the Code of Civil Procedure.

5. Rule 10, 10A and 10B of the Code of Civil Procedure read as under:

10. Return of plaint (1) Subject to the provisions of rule 10-A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

(2) Procedure on returning plaint. On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

10-A Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return (1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2) Where an intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court -

(a) specifying the Court in which he proposes to present the plaint after its return

(b) praying that the Court may fix a date for the appearance of the parties in the said Court, and

(c) requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under sub-ule (2), the Court shall, before returning the plaint and notwithstanding that the order for return

of plaint was made by it on the ground that it has no jurisdiction to try the suit -

(a) fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) give to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearance is given under sub-rule (3) -

(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded, otherwise directs, and

(b) the said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.

10-B Power of appellate Court to transfer suit to the proper Court - (1) Where, on an appeal against an order for the return of plaint, the Court hearing the appeal confirms such order, the Court of appeal may, if the plaintiff by an application so desired, while returning the plaint, direct plaintiff to file the plaint, subject to the provisions of the Limitation Act, 1963 (36 of 1963), in the Court in which the suit should have been

> instituted, (whether such Court is within or without the State in which the Court hearing the appeal is situated), and fix a date for the appearance of the parties in the Court in which the plaint is directed to be filed and when the date is so fixed it shall not be necessary for the Court in which the plaint is filed to serve the defendant with the summons for appearance in the suit, unless that Court in which the plaint is filed, for reasons to be recorded, otherwise directs.
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> (2) **The direction made by the Court** under sub-rule (1) shall be without any prejudice to the rights of the parties to question the jurisdiction of the Court, in which the plaint is filed, to try the suit.

6. Under Rule 10-B of Order 7 the appellate court may, on an application by the plaintiff may direct him to file the plaint, subject to law of limitation, in the Court in which the suit should have been instituted and fix a date for appearance. There is no power in the appeal court for directly transferring the proceedings from the trial court to any other court. It is for the plaintiff to apply for taking back the plaint and file it in appropriate court and request the appellate court to fix the date for appearance of the parties. The present application made for an order directly transferring the proceedings from the Court of Civil Judge, Sr. Division to this court and that too on an application made after the appeal is finally decided is totally

misconceived and is accordingly rejected.

(D.G. KARNIK, J)